(1) Supreme Court, U.S.
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In the

Supreme Court of the United States

ROY ELLISON, JR.,

Petitioner,

v.

SANDIA NATIONAL LABORATORIES;
SANDIA CORPORATION; LOCKHEEDMARTIN.

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Court of Appeals violate the Petitioner's right to a jury trial under the 7th Amendment to the United States Constitution when it dismissed the Petitioner's Case under Rule 56 of the Federal Rules of Civil Procedure?

Did the Court of Appeals commit reversible error when it failed to draw and consider inferences in a light most favorable to the Petitioner as the non moving party to the Respondent's summary judgment motion?

Does the burden shifting requirement of *McDonnell Douglas v. Green* with its required proof of pretext vis a vis reasons given for adverse employment actions and the substantive and procedural requirements of F.R.C.P. Rule 56 violate the 7th Amendment to the United States Constitution as applied in this case?

Did the Tenth Circuit commit reversible error in its determination that there was insufficient evidence of pretext under the *McDonnell Douglas v. Green* paradigm to proceed to trial on the merits?

The Petitioner originally brought an action under the Age Discrimination in Employment Act in the United States District Court for the District of New Mexico complaining that he had been subjected to adverse employment action and discharged from his employment for Respondents due in material part to his age. The District Court on summary judgment motion by the Respondents dismissed Petitioner's complaint holding that the Petitioner had failed to meet the elements of a prima facie case for age discrimination. The Petitioner appealed the decision to the Tenth Circuit which held that Petitioner had arguably met the elements of a prima facie case but nonetheless held that Respondent was entitled to summary judgment because

petitioner had allegedly failed to produce sufficient evidence to submit the question of pretext to a jury.

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In this cause, Petitioner respectfully petitions for a writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the Tenth Circuit which upheld the judgment of the District Court of New Mexico on grounds different from those of the District Court.

OPINIONS BELOW

The Tenth Circuit Court of Appeals decision per Judge Seymour, Judge McDonnell and Judge Krieger sitting by designation has not been published. The decision of the United States District Court for the district of New Mexico (per Judge Bruce Black) has not been published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on March 3, 2003. Petitioner applied for and received an extension of time to file this Petition until July 31, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. section 1254 (1).

STATUTORY PROVISIONS INVOLVED

This case involves the 7th Amendment to the United States Constitution the Age Discrimination in Employment Act (ADEA), 29 U.S.C. sections 621 et seq., and the Federal Rules of Civil Procedure, Rule 56.

STATEMENT OF THE CASE

The Petitioner was employed by the Respondent as an engineer at its business location in Albuquerque, New Mexico from 1961 until his termination in 1998

except for a break in service which occurred from 1973 to 1975. The Respondents operate Sandia National Laboratories, a Department of Energy research and design laboratory located in Albuquerque, New Mexico At the time of his discharge the Petitioner was 65 years of age. Until 1996 the Petitioner had received good performance evaluations for more than 30 years. In 1995, his supervisor, T. J. Williams was replaced by another manager, Jim Hole. Mr. Hole in conjunction with Mr. Williams provided the Petitioner with a good evaluation for fiscal year 1995. For fiscal year 1996 things changed. Mr. Hole met with the Petitioner to discuss his FY 1996 work performance evaluation with him. Hole welcomed the Petitioner to the meeting by informing him that he would not be working at Sandia when he is 70. Hole then proceeded to provide the Petitioner with his first ever poor work evaluation.

After this meeting, Hole submitted a written evaluation of Petitioner, wherein Mr. Hole claimed falsely that Petitioner failed to achieve the Respondent's work standards even though the Petitioner had scored well on 12 of 14 items on the evaluation criteria list. In two listed items where Hole had given Petitioner unsatisfactory scores both contained false remarks made by Hole. In one instance he misrepresented the Petitioner's involvement in a project by falsely stating that the customer had decided to pull the project because of the Petitioner. In the other he falsely stated that it was the Petitioner's responsibility to find himself new work.

The evaluation by Hole was followed in time by a Sandia workforce realignment plan. Each manager was to submit a list of excess staff positions for downsizing review.

Thereafter the Petitioner who was 65 at the time and two other coworkers in his unit who were also past 60 years of age at the time were selected by Hole for an offer of a Voluntary Separation Incentive Plan (VSIP) to induce them to quit. The VSIP by its terms was to be offered to all firing set engineering employees as an impacted peer group and not solely to individuals in the department who were over 60 years of age as happened in this case. Despite this requirement, the VSIP was only offered to the firing set engineering employees over the age of 60. The two coworkers and another individual also past 60 years of age in a sister unit elected to accept their VSIP offers and left the company. Petitioner did not accept the VSIP offer and endeavored to search for a new position within the company. Because of his age and negative current performance evaluation he was unable to find a new position.

After he refused to accept the VSIP, the Petitioner was not permitted to take advanced computer courses that he needed for his jobs in progress. Hole told the Petitioner that he could not justify the cost of the courses for someone who would not be around long enough for Sandia to benefit from them.

A second VSIP was offered to the Petitioner in March of 1997. When the Petitioner did not accept the second VSIP offered Mr. Hole opted to retain the Petitioner as his employee and simultaneously placed him on an Action Plan for improved performance ("APIP"). The APIP was regarded as a very negative process by the Sandia management and was considered to be a step short of termination. Petitioner successfully matriculated throughout the first APIP only to find that the APIP process extended by Mr. Hole three more times.

Mr. Hole's main complaint about the Petitioner during the APIP process was that he was unable to find new employment within his department or in another department. The search for work was Hole's job as a manager and not within the Petitioner's official job responsibilities. Hole admitted that he did not take issue about the Petitioner's day to day work performance.

In addition to specific engineering tasks of the APIP, Petitioner burdened by his regular work duties, and the APIP's provisions was also required to take a difficult college electrical engineering course by Mr. Hole. Later, Mr. Hole required that Petitioner undergo a mental, memory, drug, dexterity and medical examination to determine his fitness for duty. Petitioner passed both the college electronics course and the fitness for duty examination.

During this time Hole demoted the Petitioner twice ostensibly to make him more attractive for prospective lower level work. The second demotion to technologist level became effective before the first demotion was to have taken effect.

On May 4, 1998 Mr. Hole gave the Petitioner the ultimatum to either quit, retire or be fired from his position. Petitioner informed Mr. Hole that he had decided not to quit or retire and was immediately fired without a 2-weeks notice or pay in lieu of notice as required by Sandia policy.

After discovery ended but before trial on the merits, the Respondent filed a motion for summary judgment urging that the Petitioner had failed to meet the prima facie elements of his cause of action. In the alternative and germane to this matter, the Respondent

urged that it had legitimate business reasons for its decision to terminate the Petitioner namely the workforce realignment process. In this regard, the Respondent urged that the staffing cutbacks and not work performance had led to the Petitioner's termination. The Petitioner countered with evidence that he had met his prima facie case. He also presented evidence to demonstrate that the Respondent had acted intentionally to rid itself of the Petitioner in material part because of his age.

Other issues that were raised in the Respondents' summary judgment motion are not on appeal here. District Court Judge Black without entertaining oral argument by the parties dismissed the case holding that Petitioner indeed had failed to meet the prima facie case of age discrimination under the ADEA. The District Court ignored the evidence submitted by Petitioner on the issue of the intent to rid itself of Petitioner in material part because of his age. Within the time permitted for appeal, Petitioner appealed the decision of the District Court to the Tenth Circuit.

A Tenth Circuit three judge panel held that Petitioner had arguably met the prima facie elements of his case but had failed to meet his burden to produce evidence sufficient for remand for jury trial on the issue of pretext. In essence the Court of Appeals upheld the decision of the District Court on grounds that were not considered by the District Court.

REASONS FOR GRANTING THE WRIT

This petition should be granted for the following important reasons: First, the Circuit Court's grant of summary judgment to the Respondent deprived the Petitioner of his rights to a jury trial under the 7th Amendment to the United States Constitution. By holding that the Petitioner possessed insufficient evidence of pretext to proceed to a trial by jury the Court of Appeals took the case from a jury and tried the facts of the case itself. In so doing it failed to account for the whole record that was presented and failed to determine the credibility of the evidence, something that a jury should have done. Second, the Court failed to apply the required inferences to be drawn from the evidence submitted by the parties to the summary judgment motion in the light most favorable of the non-moving party, the Petitioner herein. Such failure to properly draw and assign the inferences violated Federal Rule of Civil Procedure, Rule 56 and this Court's holdings in this regard. Third, the procedure established by *McDonnell Douglas v. Green*, 411 US 792 (1972) with regard to the presentation of Title VII cases (as now applied in ADEA cases) cannot be reconciled with F.R.C.P. Rule 56 and the 7th Amendment to the United States Constitution. The Plaintiff's legal obligation to prove a pretextual basis for the Defendant's behavior cannot be subjected to Rule 56 as it would require that a Court assess and weigh the evidence and the credibility of the evidence something that it is not permitted to do under Rule 56 and the 7th Amendment where a jury trial has been demanded. Therefore, the case is ripe for determination by the Court given its important constitutional implications and in accord with this court's power to supervise the subordinate federal courts.

DISCUSSION

Question 1.

The 7th Amendment to the United States Constitution provides inter alia: "In suits at common law, where the value in controversy shall exceed twenty dollars the right to a jury trial shall be preserved. "Suits at common law" include not only suits "which at common law recognized among it old and settled proceedings but suits in which such legal rights were to be ascertained and determined [as opposed to those suits in equity] ... In a ..sense..the amendment then may be construed to embrace all suits which are not of equity and admiralty jurisdiction. Whatever may be the peculiar form which they may assume to settle legal rights" *Parsons v. Bedford*, 3 Pet. 433, 447 (1830) quoted in *Pernell v. Southall Realty*, 416 US 363, 34-375 (1973). *Curtis v. Loether*, 415 US 189, 193-195 (1974).

In this case, the Petitioner demanded a trial by jury on his Age Discrimination in Employment Act (29 USC section 621 et seq.) claims. His Age Discrimination in Employment Act suit for damages resulting from discharge and other adverse employment actions falls under the type of claims that are afforded jury trials under the 7th amendment. Petitioner's case however did not proceed to trial, instead it was dismissed by the District Court on motion for summary judgment by the Respondent. The Court of Appeals agreed with the District Court's order of dismissal but on grounds that were completely different than those offered by the District Court.

In this regard, the District Court determined that the Petitioner had failed to established a prima facie

case under the paradigm of *McDonnell Douglas v. Green*, 411 US 792 (1972). The Court of Appeals noted that a prima facie case had arguably been met but that the Petitioner had failed to provide sufficient evidence of a pre-textual reason based in age discrimination for the adverse employment actions carried on by the Respondent against him. The requirement by the Tenth Circuit that the Petitioner possess what it deemed to be sufficient evidence of pretext to proceed to trial is tantamount to deciding the case on the merits itself, something that it cannot do given the Petitioner's demand for jury trial in this case. *Cales v. Chesapeake & Ohio Railway Co.*, (DC Va. 1969) 46 FRD 36, 40; *Oldham v. West (*8th Cir. 1995) 47 F. 3d 985. Moreover, the Court committed constitutional error because it failed to address the issue of credibility of the evidence. A jury panel should have been convened to determine the credibility of the testimony of the anticipated witnesses. *Oldham v. West.*, (8th Cir. 1995) 47 F. 3d 985.

Both Courts failed to properly account for the facts of the case and Petitioner's constitutional rights to a jury trial in this matter. Given conflicting facts and the failure to determine the credibility of the evidence, summary judgment should not have been granted. See e.g., *Cales*, supra, *Shore v. Parklane Hosery*, (C.A.NY) 565 F. 2d 815, (discussing F.R.C.P. Rule 56), *Neeley v. Martin K. Eby Construction, Co.*, 386 US 317 (1967), *Hetzell v. Prince William County et al.*, 523 US 208 (1998) (discussing F.R.C.P. Rule 50). Consequently, the Petitioner's right to a jury trial of his case under the 7th Amendment were violated.

Question 2.

In its decision, the Court of Appeals failed to discuss

and apply any inferences from the evidence presented by the parties in the light most favorable to Petitioner who was the non-moving party. This violates the holdings of this Court and the jurisprudence that has developed. *Celotrex v. Catrett*, 477 US 317 (1985) on remand, 826 F. 2d 33 (10th Circuit), Cert. Den., 484 US 1066, *Martin v. Kansas*, 190 F. 3d 1120 (10th Circuit 1999) and further deprived the Petitioner of his rights under the 7th Amendment.

Question 3.

The burden shifting paradigm of *McDonnell Douglas v. Green*, 411 US 792 (1972) and its progeny applies to trial practice and is incapable of lawful analysis under Rule 56 of the Federal Rules of Civil Procedure. Under *McDonnell Douglas*, a Title VII (includes ADEA) claimant must establish a prima facie claim of discrimination. Once the prima facie elements of the cause is established the burden shifts to the Defendant to produce evidence that supports non-discriminatory reasons for the adverse action or treatment of Plaintiff. The Plaintiff then must prove within the preponderance that the evidence produced was but a pretext for discrimination.

The Petitioner does not dispute that at the prima facie case stage of the presentation that he may lose his case if the elements are not supported by evidence. What the Petitioner disputes is that he must produce sufficient evidence of pretext at the third prong of the *McDonnell Douglas* analysis in order to proceed to trial. If such were to be the case as the Tenth Circuit held in this case, the Plaintiff would have to prove his case first to a judge in a summary motion before he could proceed to trial. His demand for jury trial and the constitutional

rights under the 7th Amendment would therefore be illusory at best. Moreover the presentation of evidence in a summary judgment motion which is based upon self serving affidavits and tra. cripts makes it impossible for the court to make any de. mination of the credibility of the evidence. This has the effect of further diminishing the person's right to a jury trial to determine the outcome of his case.

Question 4.

A petition for a writ of certiorari will be granted by this Court where a court below has committed gross and inappropriate error in deciding a case. *NAACP v. Claiborne Hardware Co.*, 458 U.S.886 (1982); *Thompson v. City of Louisville*, 362 U.S.199 (1960); *Marshall v. United States*, 360 U.S. 310 (1959) In this case, the 10th Circuit Court of Appeals committed gross error in deciding the case against the Respondent. Without analysis and in a conclusory manner, the Court held that the submission of evidence by the Petitioner was insufficient as a matter of law to prove pretext. In this regard, the Court stated:

> "It is apparent from the brief Mr. Ellison filed in the district court in response to the motion for summary judgment that Mr. Ellison never focused the court on the issue of pretext...Even were we to read between the lines of Mr. Ellison's summary judgment opposition and pick out various factual assertions of conduct on Sandia's reasons for its adverse employment actions, we are not persuaded after reviewing the record that Mr. Ellison's assertions constitute

sufficient evidence for a jury to infer pretext." Appendix pp. 6a.

In this passing evaluation of the evidence of the case, the Court clearly failed to review the totality of the evidence that had been submitted by both the Petitioner and the Respondents in this matter. It essentially looked only toward the Petitioner's brief in opposition to summary judgment motion and not on the whole record. It failed to properly process the evidence that had been presented. This failure to account for evidence by a subordinate federal court falls within the supervisory review and authority of this Court.

For these reasons, the Petitioner prays that his petition for writ of certiorari be granted.

Respectfully submitted,

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No. 02-2062

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROY ELLISON, JR.,

Plaintiff - Appellant,

v.

SANDIA NATIONAL LABORATORIES; SANDIA CORPORATION; LOCKHEED MARTIN,

Defendants - Appellees.

March 3, 2003, Filed

COUNSEL: For Roy Ellison, Jr., Plaintiff - Appellant: Patrick E. Bingham, Albuquerque, NM.

For Sandia Corporation, Defendant - Appellee: Deborah D. Wells, Kennedy, Moulton & Wells, Albuquerque, NM. Nancy L. Stratton, Kennedy, Moulton & Wells, Albuquerque, NM.

JUDGES: Before SEYMOUR and MCCONNELL, Circuit Judges, and KRIEGER, District Judge. **

OPINIONBY: Stephanie K. Seymour

OPINION: ORDER AND JUDGMENT *

Before **SEYMOUR** and **MCCONNELL**, Circuit Judges, and **KRIEGER**, District Judge. **

Roy Ellison, Jr. appeals the district court's grant of summary judgment to defendants in this action filed under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.* For the reasons set out below, we affirm.

Mr. Ellison began his employment with Sandia National Laboratories in 1961 and worked there consistently, except for a hiatus from 1973 to 1976, until his termination in 1998. The facts regarding Mr. Ellison's career with Sandia, culminating in his demotion and termination, are fully set out in the district court's thorough opinion and need not be repeated here. Suffice it to say that in 1996, there was a decrease in funding to 60% of staffing level that impacted Mr. Ellison's position. In December 1996, all employees were informed that the United States Department of Energy had approved Sandia's plan for a workplace realignment. Pursuant to that plan, Sandia offered all employees the opportunity to apply for a Voluntary Separation Incentive Program, which Mr. Ellison declined to do. Rather than laying off Mr. Ellison, Sandia provided some additional training and allowed him to look for other positions in the company. In the meantime, Mr. Ellison's performance evaluations declined. Mr. Ellison claims that his demotion and subsequent termination were the result of discrimination against him because of his age.

Defendants filed a motion for summary judgment contending that Mr. Ellison failed to make a prima facie case of discrimination and that, in any event, they had shown legitimate business reasons for their actions. After evaluating the evidence submitted to it, the district court granted summary judgment for Sandia, holding that some of Mr. Ellison's claims were time barred and that Mr. Ellison had failed to establish a prima facie case of age discrimination with respect to the others.

Alternatively, the court held that Sandia had proffered legitimate reasons for the adverse actions it had taken against him, but did not discuss whether Mr. Ellison had offered evidence of pretext.

Mr. Ellison contends the district court erred in holding that he failed to establish a prima facie case of age discrimination. Age discrimination plaintiffs "may establish discrimination indirectly through the three-part framework . . . set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and its progeny." *MacDonald v. Eastern Wyo. Mental Health Ctr.*, 941 F.2d 1115, 1119 (10th Cir. 1991). Pursuant to *McDonnell Douglas*, a plaintiff "bears the initial burden of establishing a prima facie case by a preponderance of the evidence," *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1191 (10th Cir. 2000), which he can do in an age discrimination case by showing "(1) [he] was within the protected age group, (2) [he] was doing satisfactory work, (3) [he] was discharged, and (4) [his] position was filled by a younger person," *MacDonald*, 941 F.2d at 1119. *See also Munoz v. St. Mary-Corwin Hospital*, 221 F.3d 1160, 1165 (10th Cir. 2000) (defining second prong of prima facie case as "qualified" for the job (citing *Perry v. Woodward*, 199 F.3d 1126, 1135 (10th Cir. 1999)); *Horizon/CMS Healthcare Corp.*, 220 F.3d at 1192 (second prong of prima facie case in pregnancy discrimination case defined as qualified for position); *Kenworthy v. Conoco*, 979 F.2d 1462, 1469 (10th Cir. 1992) (second prong of prima facie case in sex and national origin discrimination case defined as qualified for position). In making a prima facie case, the plaintiff raises a rebuttable presumption that the defendant unlawfully discriminated against [him]. The burden of production then shifts to the defendant who must articulate a legitimate, nondiscriminatory reason for the adverse

employment action suffered by the plaintiff. . . . If the defendant is able to articulate a facially nondiscriminatory reason for the adverse employment action, the plaintiff can avoid summary judgment only if [he] can show that [his age] was a determinative factor in the defendant's employment decision, or show the defendant's explanation for its action was merely pretext.*Horizon/CMS Healthcare Corp.*, 220 F.3d at 1191 (citations and quotations omitted).

The district court held that Mr. Ellison failed to prove the second prong of his prima facie case. In doing so, the court erroneously took into consideration Sandia's evidence that Mr. Ellison's work performance had declined. A defendant's evidence regarding an employee's work performance should not be considered when determining whether the employee has made a prima facie case of employment discrimination. *See MacDonald*, 941 F.2d at 1119-20. *See also Horizon/CMS Healthcare Corp.*, 220 F.3d at 1192-93; *Kenworthy*, 979 F.2d at 1469-70. Rather, a plaintiff may establish his prima facie case by presenting "credible evidence that [he] continued to possess the objective qualifications [he] held when [he] was hired, or by [his] own testimony that [his] work was satisfactory, even when disputed by [his] employer, or by evidence that [he] held [his] position for a significant period of time." *MacDonald*, 941 F.2d at 1121 (citations omitted). The district court's reliance on Sandia's evidence as a means to undermine Mr. Ellison's prima facie case of age discrimination raises serious problems under the *McDonnell Douglas* analysis, which mandates a full and fair opportunity for a plaintiff to demonstrate pretext. Short-circuiting the analysis at the prima facie stage frustrates a plaintiff's ability to establish that the defendant's proffered reasons were pretextual and/or that age was the determining factor for discharge. *Id.* Instead, such

evidence is appropriately considered during the next phase of *McDonnell Douglas*' three part analysis. Thus, Mr. Ellison met the second prong of the prima facie case.

The district court alternatively held Mr. Ellison failed to establish that his positions were filled by a younger person after he was demoted/terminated. However, in a RIF situation, such as here, we apply a modified *McDonnell Douglas* test for the fourth prong of the prima facie case. This is so because in a RIF case, the plaintiff cannot actually point to a continuing vacancy because her position has been eliminated. She can, however, point to circumstances that show that the employer could have retained her, but chose instead to retain a younger employee. In such circumstances, "lack of vacancy" cannot explain the contested employment decision because the employer prefers to retain a younger employee in a position for which the plaintiff is qualified. Even though certain exigencies of RIF cases may explain the employer's action in such circumstances, "these exigencies are best analyzed at the stage where the employer puts on evidence of a nondiscriminatory reason for the discharge."*Beaird v Seagate Tech., Inc*, 145 F.3d 1159, 1167 (10th Cir. 1998)(footnote omitted)(citation omitted). *See also Ingels v. Thiokol Corp.*, 42 F.3d 616, 621 (10th Cir. 1994)(Fourth element of prima facie case "may be established through circumstantial evidence that plaintiff was treated less favorably than younger employees during the reduction-in-force.")(citation omitted).

We need not decide whether Mr. Ellison proferred sufficient evidence to raise a fact issue on the fourth prong of the prima facie case because even assuming that he did, we are not persuaded the district court erred

in its ultimate conclusion that summary judgment for defendants was appropriate. Having reviewed the record presented to the district court at the summary judgment stage, it is clear that Sandia offered legitimate reasons for the actions it took. n1 It was at the third stage of the *McDonnell Douglas* test that Mr. Ellison failed to counter Sandia's motion for summary judgment.

It is apparent from the brief Mr. Ellison filed in the district court in response to the motion for summary judgment that Mr. Ellison never focused the district court on the issue of pretext. In his response, Mr. Ellison asserted that he had made a prima facie showing of discrimination under the ADEA, that Sandia lacked any reason to demote and fire him, and that disputed issues of fact remained. He did not assert that he met the third prong of *McDonnell Douglas* by raising an inference that Sandia's reasons were pretextual.

Even were we to read between the lines of Mr. Ellison's summary judgment response and pick out various factual assertions of conduct on Sandia's part that Mr. Ellison believes shows the illegitimacy of Sandia's reasons for its adverse employment actions, we are not persuaded after reviewing the record that Mr. Ellison's assertions constitute sufficient evidence for a jury to infer pretext. n2

Finally, even assuming there is a cause of action under the ADEA for hostile work environment, *see McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1129 (10th Cir. 1998), the evidence Mr. Ellison has proffered does not state a claim.

Accordingly, the district court did not err in granting summary judgment for Sandia. The judgment of the district court is **AFFIRMED**.

ENTERED FOR THE COURT

Stephanie K. Seymour

Circuit Judge

- ---------- Footnotes ----------

n1 "The defendant's burden at this stage is one of production, not one of persuasion." *Horizon/CMS Healthcare Corp.*, 220 F.3d at 1191 (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-56, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981)).

n2 We note that much of the factual basis for Mr. Ellison's argument on appeal is based on parts of the record that were not before the district court. We have not considered this material.

No. CIV 00-797 BB/WWD-ACE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

ROY ELLISON, JR.,
Plaintiff,

v.

SANDIA NATIONAL LABORATORIES, SANDIA CORPORATION, LOCKHEED MARTIN,
Defendants.

January 28, 2002, Decided
January 28, 2002, Date Opinion Filed

COUNSEL: For Plaintiff(s): Patrick Bingham, Albuquerque, NM.

For Defendant(s): Deborah D. Wells, Albuquerque, NM.

JUDGES: BRUCE D. BLACK, United States District Judge.

OPINIONBY: BRUCE D. BLACK

OPINION:

THIS MATTER comes before the Court on the defendants' motion for summary judgment (Doc. 21, filed September 17, 2001) on the plaintiff's complaint (Doc. 1, filed June 1, 2000), wherein the plaintiff alleges that his former employer discriminated against him because of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., and in breach of the public policy of the State of New Mexico.

The Court has examined the parties' submissions and the relevant legal authorities, and, for the reasons set forth below, finds that the defendants' motion for summary judgment should be **GRANTED.**

I.

FACTUAL BACKGROUND

Plaintiff Roy Ellison, Jr. ("Employee"), began his employment with Defendant Sandia National Laboratories ("Employer") in 1961. (See Employer's opening brief, exhibit A at 4-7, 21.) He continued working for Employer as a Member of Technical Staff ("MTS") until 1973, when he was laid off. Employee returned to Employer in 1976 as an MTS. Pursuant to a laboratory-wide reclassification project, Employee was reclassified from an MTS to a Senior Member of Technical Staff ("SMTS") in 1989. Throughout all relevant times of his employment, Employee was assigned to the Firing Set, Fuse & Switch Tube Department 2671 ("Department").

In February 1996, Employee met with his supervisor, James W. Hole, for a mid-year review of his work performance for the time period ranging from July 1995 through June 1996. (See Employer's exhibit F.) During that meeting, Mr. Hole advised Employee that he was not progressing at a rate commensurate with his performance expectations. (See Employer's exhibit A at 125.) Employee also was advised at the meeting that his principal assignment was to locate new work outside of the Department because the work he specialized in was no longer in sufficient demand to support his full time effort.

Later that month, Mr. Hole requested that Employer provide retraining for Employee because the Department was funded at 60% of its staffing level and Employee's position was identified as impacted,

meaning that there was not enough funding to cover the compensation expended for his position. (See Employer's exhibit C.) There were no suitable SMTS-level projects for Employee in the Department nor in its sister department, the Firing Set & Mechanical Design Department 2674. (See Employer's exhibit E at 10.) As a result, Employee became involved in Sandia Corporation's workforce realignment process. Employee was informed at that time that he needed to look for another position within Sandia Corporation.

In July 1996, Employee met with Mr. Hole for an end-year review of his work performance for the time period ranging from July 1995 through June 1996. (See Employer's exhibit F.) At the meeting, Employee received his annual work performance evaluation, which rated his work performance as Below Performance Expectations ("BP"). As a result of the BP work performance rating, Mr. Hole placed Employee on a verbal Action Plan for Improved Performance ("APIP"). (See Employer's exhibit E at 39-40.)

An APIP serves several purposes, including the documentation of an employee's deficient work performance as well as the formulation of a strategic plan for elevating the employee's deficient performance to the expected work performance level. (See id.; Employee's response brief, exhibit E at 10.) It serves the additional purpose of informing the affected employee that if the noted deficiencies are not corrected, the employee's employment may be terminated. (See Employee's exhibit E at 10.) Indeed, an APIP may be regarded as the step immediately preceding termination of employment.

In October 1996, Mr. Hole again identified Employee's position as impacted. (See Employer's exhibit G.) Two months later, all Sandia Corporation employees, including Employee, received a letter from

the corporation's president and laboratory director advising them that the United States Department of Energy approved Sandia Corporation's plan for a workplace realignment. (See Employer's exhibit H.) As part of the workplace realignment plan, Sandia Corporation offered all employees, including Employee, the opportunity to apply for a Voluntary Separative Incentive Program ("VSIP"). Employee did not apply for the VSIP. (See Employer's exhibit A at 91.)

In the course of the realignment process, various individuals at Sandia Corporation, including Mr. Hole, made numerous efforts to place Employee in another position. (See Employer's exhibit E at 41.) However, none of those efforts proved successful. (See id. at 41-42.) At the end of the realignment process, Employee's impacted position was the only position still not resolved. (See Employer's exhibit A at 91.) Concurrent with the laboratory-wide realignment process, Sandia Corporation implemented a new job classification system, the Integrated Job Structure System ("IJS"). As a result of that process, Employee was placed at the TS 1 (MTS) level. (See Employer's exhibit J.)

In February 1997, rather than laying Employee off, Sandia Corporation's realignment board provided funding to cover up to 1,040 hours of his time to support his reassignment or retraining. (See Employer's exhibit I.) Employee was placed on a six month written APIP for the time period ranging from March 1997 through September 1997. In relevant part, the APIP: (1) documented Employee's lack of technical and project management skills, which caused him to lose work assignments; (2) listed APIP performance expectations; (3) identified training courses; (4) outlined steps for improvement; and (5) specified consequences of non-improvement. Employee's primary task under the APIP was to find another job outside of the Department,

because there was insufficient work for him to perform in areas where Mr. Hole felt he could contribute. (See Employer's exhibit A at 125 and exhibit E at 38.)

During the first written APIP period, Mr. Hole met with Employee on a weekly basis to review his progress. (See Employer's exhibit E at 65.) Mr. Hole documented each performance review in a monitor schedule. (See id.; Employer's exhibit I.) Mr. Hole noted in the August 1997 monitor schedule that Employee exhibited insufficient progress in his work performance for 21 of 26 weeks and exhibited a decline in his work performance for 2 of the 26 weeks. (See Employer's exhibit I.) Factors contributing to Employee's unsatisfactory assessment were his: (1) failure to meet the deadline for an analysis of two magnetic devices and failure to provide a usable analysis; (2) failure to timely complete a feasibility study; (3) requiring excessive oversight and direction; and (4) poor organizational and presentation skills.

In August 1997, Mr. Hole conducted a "final warning" meeting with Employee. (See Employer's exhibit K.) In that meeting, Mr. Hole counseled Employee regarding his failure to meet the performance expectations set forth in the APIP and instructed him to take a "decision making" leave day to decide if he wished to continue his employment with Sandia Corporation and meet the performance expectation level of a technical staff member. After taking the day of leave, Employee advised Mr. Hole that he wanted to continue working for Employer and that he hoped to make sufficient improvements to continue working at his employment level. At that time, Mr. Hole reminded Employee that if he failed to meet the performance objectives established for him, his employment could be terminated.

Two weeks later, Employee met with Mr. Hole for an annual performance review meeting for the time period

ranging from July 1996 through June 1997. (See Employer's exhibit I.) During that meeting, Mr. Hole advised Employee that his performance for the review period was rated as "unsatisfactory" because of his failure to meet the expectations outlined in the APIP. The APIP performance period ended on September 10, 1997. (See Employer's exhibit L.) Because Employee's work performance had not improved to meet the performance expectations outlined in the APIP, Employee was demoted from the position of an SMTS to the position of a Senior Technical Associate ("STA"), effective September 12, 1997. (See Employer's exhibit M.) Employee's demotion translated to the position of a Senior Technologist ("STNG") in the IJS job restructure.

Employee was placed on a second written APIP for the time period ranging from September 1997 to December 1997. (See Employer's exhibit N.) Mr. Hole continued to hold weekly status meetings with Employee throughout the duration of the second APIP. (See Employer's exhibit O.) Employee failed to meet the expectations established in the second written APIP for the following reasons: (1) he was unable to commit to a reasonable time for completion of a technologist project; (2) he issued correspondence erroneously indicating that certain laboratory material could be discarded, which concerned other members of the Department; and (3) he failed to accept new work. (See Employer's exhibit O.) Rather than recommending termination at the end of the APIP period, Mr. Hole extended the second APIP for six weeks to allow Employee another opportunity to demonstrate satisfactory performance at the STNG level. (See id.; Employer's exhibit P.)

The third and final written APIP endured for the time period ranging from January 1998 through March 1998. (See Employer's exhibit Q.) At the end of that period,

Mr. Hole determined that Employee had failed to meet the APIP's objectives for the following reasons: (1) he failed to perform at the STNG level in terms of both the quantity and quality of his work; (2) he failed to provide required schedules and progress records; and (3) he failed to accept and execute multiple job assignments concurrently without excessive supervision. Because of those failures, Mr. Hole recommended that Employee's employment be terminated. (See Employer's exhibit E.) Notwithstanding his recommendation, Mr. Hole made a final attempt to identify another job for Employee with Employer at the Technologist ("TNG") level. Mr. Hole's attempt proved unsuccessful, however, because there were no TNG-level jobs available at that time.

On May 4, 1998, Mr. Hole informed Employee that he was immediately relieved of his duties because he had failed to meet the conditions set forth in the four APIPs. (See Employer's exhibit R.) Mr. Hole provided Employee with the option of retiring, resigning, or being fired. (See Employer's exhibit E.) Employee declined to resign or retire, so his employment was terminated. (See Employer's exhibit S.)

Following the termination of his employment, Employee's job was not filled. (See Employer's exhibit E; Employee's exhibit C.) Instead, two or three days' worth of technologist-level work that Employee had performed was assigned to Angela Stewart, who was then in her mid to late 30s and worked at the STNG level. (See Employee's exhibit C.) Another portion of the work that Employee had performed was assigned to Ken Marx, who was then 61 years of age and worked at Lawrence Livermore Laboratories at the PMTS level.

On July 8, 1998, Employee filed a charge of age discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging *inter alia* that Employer terminated his employment because of his

age, then 67 years. (See Employee's complaint at 2.) The EEOC issued Employee a right to sue letter in March 2000. Employee filed this lawsuit less than three months later, seeking redress under the Age Discrimination in Employment Act ("Act") and the common law of the State of New Mexico.

II.

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In evaluating a motion for summary judgment, the court views the evidence and draws all reasonable inferences therefrom in the light most favorable to the nonmoving party. See Martin v. Kansas, 190 F.3d 1120, 1129 (10th Cir. 1999). However, it is "not required to evaluate every conceivable inference which can be drawn from evidentiary matter, but only reasonable ones." Lucas v. Dover Corp., 857 F.2d 1397, 1401 (10th Cir. 1988).

The party moving for summary judgment bears the burden of showing that no genuine issue of material fact exists. See Adams v. American Guarantee and Liability Ins. Co., 233 F.3d 1242, 1246 (10th Cir. 2000); Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir.1998) (stating that moving party may satisfy its burden by "pointing out to the court a lack of evidence for the nonmovant on an essential element of the nonmovant's claim."). Once the movant meets its burden, the nonmovant must identify evidence that would enable a trier of fact to find in the nonmovant's favor. See Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, 1024 (10th Cir. 1992). The evidence presented at

the summary judgment stage need not be produced in a form that would be admissible at trial, so long as the "content or substance of the evidence" is admissible. See Wright-Simmons v. City of Oklahoma City, 155 F.3d 1264, 1268 (10th Cir.1998).

III.

DISCUSSION

A. TIMELINESS OF CLAIMS

The issue is whether Employee may seek redress against Employer for discriminatory conduct that allegedly took place before September 11, 1997, which precedes the filing of Employee's EEOC complaint by 300 days. n1 In New Mexico, a complainant generally must file a charge of age discrimination with the EEOC within 300 days of the aggrieved conduct. See Aronson v. Gressly, 961 F.2d 907, 910 (10th Cir. 1992) (ruling that a complainant in a state that has a statute prohibiting age discrimination in employment must file a charge with the EEOC within 300 days of the accrual of the claim); NMSA 1978, § 28-1-7 (1969) (prohibiting age discrimination in employment); see also EEOC v. Commercial Office Products Co., 486 U.S. 107, 110, 100 L. Ed. 2d 96, 108 S. Ct. 1666 (1988) (ruling that a plaintiff who institutes proceedings with a state agency authorized to grant relief from the practice charged has 300 days within which to file a complaint with the EEOC); Sabella v. Manor Care, Inc., 121 N.M. 596, 915 P.2d 901, 904 (N.M. 1996) (ruling that a complaint filed with the EEOC is deemed to have been properly filed with the New Mexico Human Rights Division).

Employee attempts to avoid the Act's limitations period by invoking the "continuing violation doctrine." Under that doctrine, a plaintiff may seek redress for incidents that occurred outside of the Act's limitations

period if at least one instance of the aggrieved conduct occurred within that period and the earlier incidents constitute a "continuing pattern of discrimination." Furr v. AT&T Technologies, Inc., 824 F.2d 1537, 1543 (10th Cir. 1987). In determining whether the prior incidents of alleged age discrimination constitute a continuing pattern of age discrimination, the court must consider three factors: (1) subject matter–whether the violations constitute the same type of discrimination; (2) frequency; and (3) permanence–whether the nature of the violations should trigger an employee's awareness of the need to assert his or her rights. See Martin v. Nannie and the Newborns, Inc., 3 F.3d 1410, 1415 (10th Cir. 1993) (decided in the context of a Title VII claim); see also Bruno v. Western Elec. Co., 829 F.2d 957, 960, fn. 1 (10th Cir. 1987) (ruling that courts may "refer to interpretations of provisions in Title VII for assistance in defining analogous sections of the ADEA.").

The continuing violation doctrine is predicated upon the equitable principle that a statute's limitations period should not begin to run until a reasonable person would be aware that his or her rights have been violated. See Martin, 3 F.3d at 1415. Thus, if an event or series of events would have alerted a reasonable person to assert his or her rights at the time of the alleged violation, the employee cannot later rely upon the continuing violation doctrine to overcome the Act's requirement of filing a charge with the EEOC with respect to that event or series of events. See id.; see also Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1311 (10th Cir. 1999) (stating that "a continuing violation claim will likely fail if the plaintiff knew, or through the exercise of reasonable diligence would have known, she was being discriminated against at the time the earlier events occurred.").

Employer claims that Employee should not be allowed to invoke the continuing violation doctrine, because he has admitted that throughout his employment he felt discriminated against because of his age. Employer points out that as early as 1976, Employee opined he was the victim of age discrimination:

> Q: Okay. But my question, Mr. Ellison, is between 1976 and 1978 is it your contention that you experienced any age discrimination at Sandia?
>
> A: I felt it was on all the time.

Employer's exhibit A at 25.

Employee based his opinion on Employer's practice of placing new hires on a scatter gram as a means of documenting each employee's progress within the organization. n2 As Employee stated in his deposition:

> A: . . . I believe Sandia has always been age sensitive to everybody. I believe everybody who gets in their 50's begins to feel the pressure of age discrimination, perhaps primarily because of that percentile, totally age discriminatory system they have of putting a person in a percentile position from which they can never get out.

Id. at 88.

Employee specifically opined he was the victim of age discrimination in 1982, when he was denied a managerial promotion:

> Q: Okay. But there weren't any managerial promotion type positions that you didn't receive other than the one in 1982 to 1983; is that correct?
>
> A: Well, that was the only one I felt comfortable in going after. And then, when Dave Palmer–when I reflected on what he had said, I said, you know, what's the use of wasting my time, you know? Sandia has locked me into a position I cannot get out of. I can't even get a decent raise, much less a promotion. That was age discrimination, period.
>
> Q: So you didn't apply for any other managerial positions other than the one in '82 and '83; is that correct?
>
> A: No. I don't beat my head against a brick wall just because it feels good when I stop.

Id. at 20-21.

Employee testified at his deposition that the age discrimination he felt since rejoining Employer in 1976 persisted through the date he was fired. In particular, he testified that from the date Mr. Hole became his manager, May 1995, to the date his employment was terminated, March 1998, he felt discriminated against because of his age:

> Q: Is it your belief, then, Mr. Schmitt took action [in March 1997] to intentionally discriminate against you on the basis of your age?
>
> A: He had already done that.

> Q: And what action do you contend Heinz Schmitt took to intentionally discriminate against you on the basis of your age?
>
> A: Well, there seemed to be a concerted effort when Jim [Hole] took over T.J. Williams' job [in May 1995], a concerted effort from day one until the day I was terminated [in March 1998] to engineer me into a position in which they could terminate me.

Id. at 90-91.

Employee specifically recalled that in early 1996, Mr. Hole allegedly put him on notice that he would be fired before reaching the age of 70. According to Employee:

> Q: Do you recall a subsequent conversation [in 1996] with Mr. Hole during your PMF on that point [i.e., when Employee intended to retire]?
>
> A: Yeah. I was kind of surprised to hear Jim [Hole] say, "You're not going to work here–you can't expect to work here when you're 70." "You're not going to work here when you're 70," I think were more exactly the words. . . .
>
> . . .
>
> Q: Do you recall what context the comment was made in?
>
> . . .

> A: Well, he was putting me on notice, I guess, that I wasn't going to be working there when I'm 70.

Id. at 246-47.

Employee has admitted that throughout his employment he felt discriminated against because of his age, and he has mentioned several specific incidents that supported his feeling. In doing so, Employee has shown that he was either on actual notice or on inquiry notice of the need to assert his rights. Consequently, the continuing violation doctrine, which is predicated upon the equitable notion that the "clock" should not begin to run on a plaintiff's claim until a reasonable person would be aware that his or her rights have been violated, is not applicable in this case. See Bennett, 258 F.3d at 1227 (concluding that the "permanence" factor may, by itself, prove fatal to a plaintiff's continuing violation claim); Bullington, 186 F.3d at 1311, fn. 4, *citing* Selan v. Kiley, 969 F.2d 560, 565 (7th Cir.1992) (stressing the significance of the "permanence" factor in a continuing violation analysis); Holmes v. Regents of Univ. of Colo., 176 F.3d 488, 1999 U.S. App. LEXIS 16406, 1999 WL 285826, *4 (10th Cir. 1999) (unpublished opinion) (refusing to apply the continuing violation doctrine where plaintiff"specifically admitted she was convinced the [employer] was discriminating against her as early as March 1993, but she did nothing to assert her rights at that time.").

In response, Employee states, without citation to the record, that comments were made about his receding hairline, frequent inquiries were made into when he intended to retire by unnamed co-workers, and a cartoon that derogatorily referenced him was posted on his window. See Employee's response brief at 8. Employee claims that each of those occurrences were

subtle and did not impress upon him that he was unequivocally the victim of discrimination.

Employee has not directed the Court's attention to the portions of the record that support his factual claims, so the incidents noted above are not properly before the Court. However, assuming that the above incidents did in fact occur, Employee's perception of them as "subtle acts" does nothing to contradict his specific admissions that throughout his employment he felt discriminated against because of his age. Employee has therefore failed to raise a genuine issue of material fact on this issue. Accordingly, Employee may not invoke the continuing violation doctrine in this case.

B. DISPARATE TREATMENT

1. *Prima Facie* Case

The issue is whether Employee has satisfied his initial burden of establishing a *prima facie* case that Employer discriminated against him because of his age. See Sanchez v. Denver Public Schools, 164 F.3d 527, 531 (10th Cir. 1998) (stating that the plaintiff in an ADEA case "bears the initial burden of setting forth a *prima facie* case of discrimination."). In order to establish such a case, Employee must show that: (1) he was at least 40 years of age; (2) he was qualified for his job; (3) despite his qualifications, he suffered an adverse employment action; and (4) his job was not eliminated after the adverse action was taken against him. See Munoz v. St. Mary-Corwin Hosp., 221 F.3d 1160, 1165 (10th Cir. 2000). Because this case involves, in part, a reduction in Employer's workforce, Employee may in the appropriate circumstances satisfy the fourth element of the *prima facie* case by showing that he "was treated less favorably than younger employees during the reduction-in-force. " Ingels v. Thiokol Corp., 42 F.3d 616, 621 (10th Cir. 1994).

a) Adverse employment actions

Employee must establish as part of his *prima facie* case that he suffered an adverse employment action. See Munoz, 221 F.3d at 1165. An employer's conduct amounts to an adverse employment action if it "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Sanchez, 164 F.3d at 532, *quoting* Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998). However, "a mere inconvenience or an alteration of job responsibilities" does not amount to an adverse employment action. See Sanchez, 164 F.3d at 532 (internal quotation omitted).

Employee seeks redress against Employer for three adverse employment actions which, if supported by substantial evidence, satisfy the standard set forth in the Sanchez case: (1) denial of a managerial promotion for which he applied in the 1982 fiscal year; (2) demotion from the position of SMTS to the position of STNG on September 12, 1997; and (3) termination of his employment on March 4, 1998. The Court will consider in turn the merits of each asserted adverse employment action.

1) promotion

Employer moves for summary judgment on Employee's "failure to promote" claim on the ground that it is time-barred. See Employer's opening brief at 12; see generally Employee's response brief (failing to directly address Employer's argument on this point). The Court addressed this issue in Section A of this Opinion, holding that Employee cannot recover for discriminatory conduct that allegedly took place before September 11, 1997. Employee's contention that he was

improperly denied a managerial promotion in the 1982 fiscal year will therefore be dismissed as untimely.

The managerial promotion Employee failed to receive in 1982 apparently is the only promotion for which he applied. See Employer's exhibit A at 20 (admitting that he did not apply for any promotion other than the noted managerial promotion). That being the case, Employer is entitled to summary judgment on any grievance Employee asserted or intended to assert in his failure to promote claim. See Bennett, 258 F.3d at 1228 ("To establish a *prima facie* case for failure to promote, plaintiff must show, among other things, that she applied for–or at least sought–the position at issue.").

2) demotion

Employer moves for summary judgment on Employee's demotion claim in which Employee alleges that he was improperly demoted from the position of SMTS to the position of STNG on September 12, 1997. See Employer's opening brief at 13-14; Employee's response brief at 6. In support of its motion for summary judgment on this issue, Employer argues that: (a) Employee was not qualified for the position at issue, and (b) the job from which Employee was demoted was eliminated. See Jones v. Denver Post Corp., 203 F.3d 748, 753 (10th Cir. 2000) (stating that in order to establish a *prima facie* case of discriminatory demotion, a plaintiff must show *inter alia* that he was qualified for the position at issue and that the job from which he was demoted was not eliminated).

(a) qualifications

Employer, relying upon Employee's employment records and Mr. Hole's deposition testimony, claims that Employee was not qualified for the SMTS position. n3 Mr. Hole placed Employee on a written APIP for the time period ranging from March 1997 through

September 1997, because Employee had demonstrated a lack of technical and project management skills, both of which are requirements of an SMTS-level employee. The APIP listed concrete performance expectations, identified required training courses, outlined definitive steps for improvement, and specified consequences of non-improvement. Employee's primary task under the APIP was to find another job outside of the Department, because there was not enough SMTS-level work for him to perform in areas where Mr. Hole felt he could contribute.

The monitor schedule used by Mr. Hole to document Employee's progress indicates that Employee failed to meet the objectives set forth in the APIP, including the APIP's primary objective that he locate sufficient work to sustain his position as an SMTS. Based on Employee's failures, Mr. Hole concluded that Employee was not qualified to retain the position of SMTS and therefore demoted him to the position of STNG. See Employer's exhibit E at 20 ("His performance was not adequate to bring in the funding necessary to keep him as an employee, as a member of technical staff."). Such evidence sustains Employer's claim that Employee was not qualified for the position from which he was demoted. See Jones, 203 F.3d at 753.

In response, Employee claims that the Court cannot hold as a matter of law that he failed to meet the APIP's objectives, because the monitor schedule used to document his work performance is contradictory. See Employee's response brief at 6. In support of his claim, Employee points out that the "typed portion indicates that the performance objective[s] are being met" and the "handwritten portion agrees in parts and disagrees as to other parts of the 'evaluation.'" Id. The argument is disingenuous. Employee typed the "self-evaluation" portion of the monitor schedule and Mr. Hole handwrote

the "supervisor evaluation" portion of the monitor schedule. The monitor schedule is therefore not contradictory as Employee is the only one who concluded he was meeting necessary objectives. It is Mr. Hole's assessment of Employee's work performance that controls the issue of whether Employee fulfilled the APIP's objectives, not Employee's subjective evaluation of his own performance. See Jones, 203 F.3d at 754 ("It is the manager's perception of the employee's performance that is relevant, not plaintiff's subjective evaluation of his own relative performance."); Young v. Cobe Laboratories, Inc., 141 F.3d 1187, 1998 U.S. App. LEXIS 14154, 1998 WL 184449, *4 (10th Cir. 1998) (unpublished opinion) (rejecting plaintiff's assertion that her job performance was satisfactory, where documentary evidence in the record was "replete with sustained criticism of [plaintiff's] negative attitude and deficient job performance.").

Employee also claims there is a factual issue of whether he failed to meet the APIP's objectives. See Employee's response brief at 5. Employee argues that although his employment records state that he failed the first written APIP, those records are inconsistent with and are contradicted by Mr. Hole's deposition testimony. Employee supports his argument by pointing out that Mr. Hole testified that Employee's projects always "worked" and that Employee obtained a grade of 90% in the circuit design course he was required to take under the APIP, the implications being that Employee was performing well in his job and that he had fulfilled the APIP's objectives.

Employee takes Mr. Hole's deposition testimony of out context. See Employer's exhibit E at 43-44 and exhibit U at 50. Although counsel for Employee did elicit from Mr. Hole that Employee's projects always functioned properly, Mr. Hole explained why he

nevertheless remained critical of Employee's work performance:

> Q: But it [Employee's electrical design work] worked?
>
> A: Yes, it did.
>
> Q: Was it reliable?
>
> A: But in terms of our design needs, there is a question about availability of components and what should be used.
>
> . . .
>
> Q: How did you come to decide that the designs could be updated in terms of the circuitry of the products involved?
>
> A: One of the questions was how to get [Employee] to have a skill set that could make him a full-time employee of the firing set group. And there is much more electrical design work than there is magnetic modeling, and I wanted to try to bring his skills in that area up to the point that he could be adequate and compete with his peers.
>
> Q: And what was the remedy to bring him up to snuff?
>
> A: The immediate remedy that I could bring in was to assign him to take a course at the University of New Mexico.

Employer's exhibit E at 43-44.

Counsel for Employee followed up Mr. Hole's testimony by eliciting from Mr. Hole that Employee had successfully completed all of the coursework assigned to him in the APIP. See id.; see also Employer's exhibit U at 50. However, Mr. Hole subsequently explained why completing the coursework at the University of New Mexico was not tantamount to fulfilling the APIP's objectives:

> Q: Why didn't you just say, okay, he's done the things that he's done, I'm just going to back off. He's performing adequately. Why didn't you come to that conclusion?
>
> A: You said two things. You said, he's done the things that were required in the APIP. He has done the coursework that was required in the APIP, but it was not the primary objective of the APIP, and it was not the outcome of the APIP that was – Taking the coursework was not an adequate outcome of the APIP. An adequate outcome of the APIP was that his performance and abilities got up to a level where we could continue to employ him as a senior member of technical staff in the firing set group.

Employer's exhibit U at 50.

Based on the foregoing evidence, the Court concludes that Employer has established that Employee was not qualified for the SMTS position at the time of his demotion. While Employee may disagree with the APIPs' summary of his work deficiencies and Mr. Hole's assessment of his overall work performance, Employee admits that he failed to find sufficient work to sustain his position in the Department, which was the primary task assigned to him under the APIP. Furthermore, Mr.

Hole's assessment of Employee's work performance controls the issue of whether Employee was qualified for the SMTS position, not Employee's subjective evaluation of his own performance. See Jones, 203 F.3d at 754; see also Young, 141 F.3d at 1187, 1998 U.S. App. LEXIS 14154, 1998 WL at *4. Accordingly, Employee has failed to meet his burden of showing that he was qualified for the SMTS position.

(b) Job Elimination

Employer advances a second reason why Employee's demotion claim must be dismissed on summary judgment. Employer claims that after Employee was demoted the SMTS position formerly held by him was not filled. See Employee's opening brief at 14 ("Plaintiff also cannot meet the fourth element of the *prima facie* showing: that the job from which he was demoted was not eliminated."). Employer's claim is supported by Employee's employment record, which indicates that as early as February 1996 there was not enough funding provided to the Department to support Employee's position as an SMTS. See Employer's exhibit C. That claim also is supported by Mr. Hole's deposition testimony:

> Q: Now, Mr. Ellison's [SMTS] position, why was that targeted?
>
> A: Because that was a position which we did not need on a full-time basis, and we were unable to bring in enough work to keep that position funded.

Employer's exhibit E at 10.

In response, Employee argues that there is a factual issue of whether his SMTS position was eliminated after he was demoted, because his "work was parceled to two

people [Ms. Stewart and Mr. Marx] after his termination." Employee's response brief at 2-3. That argument must be rejected on two independent grounds.

First, Ms. Stewart and Mr. Marx were not given any of Employee's work when he was demoted from an SMTS to an STNG. Rather, by Employee's own admission, they were given some of his work after his employment was terminated. Employee was classified as and was performing the work of an STNG, not an SMTS, at the time his employment was terminated. Thus, Ms. Stewart and Mr. Marx did not perform any of Employee's SMTS-level work, because Employee was not an SMTS when his employment was terminated. Employee's claim that his SMTS position was filled upon his demotion has no basis in fact, and it must therefore be rejected on that ground.

Second, even assuming that some of Employee's SMTS-level work was parceled to Ms. Stewart and Mr. Marx upon his demotion, such conduct does not support his contention that he was replaced. Ms. Stewart already was employed by Employer, and she performed only two to three days' worth of work that had been performed by Employee. Mr. Marx already was employed by Lawrence Livermore Laboratories as a PMTS, and he performed only the analog circuitry work that had been performed by Employee. Because Employee's work responsibilities were "divided up and absorbed by . . . existing employees and no new person took over his former responsibilities[,]" his claim must be rejected. Furr v. Seagate Technology, Inc., 82 F.3d 980, 988 (10th Cir. 1996) ("The test for position elimination is not whether the responsibilities were still performed, but rather whether the responsibilities still constituted a single, distinct position."); see Godfredson v. Hess & Clark, Inc., 173 F.3d 365, 373 (6th Cir. 1999) ("[A] person is not replaced when another

employee is assigned to perform the plaintiff's duties in addition to other duties . . ."). Furthermore, there is no evidence in the record that, unlike Employee, Ms. Stewart and Mr. Marx were then subject to the APIP process or that their work was considered deficient, so Employee cannot show that he was treated less favorably than younger, similarly situated co-workers. Cf. Ingels, 42 F.3d at 621.

3) termination

Employer moves for summary judgment on Employee's termination claim in which Employee argues that he was fired without cause from his STNG position. See Employer's opening brief at 14-15. In support of its motion, Employer argues that: (a) Employee was not qualified for the STNG position, and (b) Employee's STNG position was not filled after he was fired from that position. See Munoz, 221 F.3d at 1165 (stating that in order to establish a *prima facie* case of discriminatory termination under the ADEA, the plaintiff must show *inter alia* that he was qualified for the position at issue and that the job from which he was terminated was not eliminated).

(a) qualifications

Mr. Hole placed Employee on a second written APIP for the time period ranging from September 1997 through December 1997, in order to monitor his work performance at the STNG level. The APIP listed concrete performance expectations. It also stated that Employee's progress in meeting those expectations would be assessed by whether he completed tasks at a rate consistent with that of other employees, whether he required excessive supervision, whether the quality of his work was consistent with that of other employees, and whether he accepted and carried out job assignments.

The monitor schedule used by Mr. Hole to document Employee's progress indicates that Employee failed to meet the objectives set forth in the APIP, including the APIP's critical objective that he demonstrate an ability to perform laboratory work. Despite Employee's failures, Mr. Hole did not recommend termination of his employment, but instead Mr. Hole decided to extend the second written APIP for six weeks to allow Employee another opportunity to demonstrate satisfactory performance at the STNG level. The final APIP listed the same performance expectations and contained the same measures of performance as the second written APIP.

The monitor schedule for the final APIP indicates that Employee failed to meet the objectives set forth in the APIP. In particular, the monitor schedule states that: (1) Employee failed to complete work at the pace of other STNG-level employees; (2) he failed to provide schedules and records of his progress, and (3) he failed to accept and carry out multiple job assignments without excessive supervision. Based on Employee's failures, Mr. Hole concluded that Employee was not qualified to retain the position of STNG and therefore recommended that his employment be terminated. Such evidence sustains Employer's claim that Employee was not qualified for the position from which he was demoted. See Jones, 203 F.3d at 753.

In response, Employee claims he was discharged even though his work performance was adequate. See Employee's response brief at 4. However, Employee has not presented any evidence to support that claim nor has he presented any evidence that calls into question the evaluations made of his work performance in the monitor schedules. Instead, Employee again argues that the monitor schedules are inadmissible hearsay. The Court, having already rejected that argument, concludes that Employer is entitled to summary judgment on the

termination claim because Employee's subjective evaluation of his performance has no bearing on the issue of whether he was qualified for the STNG position. See Jones, 203 F.3d at 754.

(b) job elimination

Employer advances a second reason why Employee's termination claim must be dismissed on summary judgment. Employer claims that after Employee was discharged the STNG position formerly held by him was not filled by another person. See Employee's opening brief at 7 ("Following plaintiff's termination, his job was not filled."). Employer's claim is supported by Mr. Hole's deposition testimony: "When we terminated Mr. Ellison, our association with that work also quit. We did not find a replacement individual." Employer's exhibit E at 103. Employer's claim also is supported by Employee's deposition testimony:

> Q: Okay. When you were terminated by Sandia, who do you feel replaced you? Was someone hired in outside of Sandia to replace you in that position?
>
> A: From outside of Sandia?
>
> Q: Right.
>
> A: I don't think that I could identify anybody that got hired in from outside Sandia that took my position. God help him if he did.
>
> . . .
>
> Q: So all the work you were doing at the time you were terminated, was a younger employee hired to fill that position?

> A: Or part of it because I don't think you could hire anybody to fill that position working 80 hours a week. I don't know of any new employee. Well, there was one new employee that was around there, but I don't think he worked in our department. No. He must have been working in the strong – I don't know of anybody that is a fresh new hire or they came in.

Employer's exhibit A at 238-39.

In response, Employee claims there is a factual issue of whether his position was eliminated after he was demoted, because his "work was parceled to two people [Ms. Stewart and Mr. Marx] after his termination." Employee's response brief at 2-3. The Court has already addressed this issue, holding that Employee was not replaced because Ms. Stewart and Mr. Marx were existing employees, and they merely absorbed Employee's former responsibilities. See Furr, 82 F.3d at 988; Godfredson, 173 F.3d at 373. Furthermore, there is no evidence in the record that, unlike Employee, Ms. Stewart and Mr. Marx were then subject to the APIP process or that their work performance was considered deficient, so Employee cannot show that he was treated less favorably than younger, similarly situated co-workers. Accordingly, Employee's termination claim will be dismissed.

4) preferential assignments

Employer moves for summary judgment on Employee's preference claim in which Employee alleges that younger employees were given preferential work assignments. See Employer's opening brief at 16; Employee's response brief (failing altogether to address Employer's argument on this issue). In support of its motion, Employer argues that: (a) each claim of alleged

preferential treatment asserted by Employee is time-barred, (b) the award of preferential work assignments does not constitute an adverse employment action, and (c) Employee has failed to establish that he was treated less favorably than other similarly-situated employees. See Employer's opening brief at 16.

(a) time-bar

Employee claims that Russell Humphreys, Greg Lyons, George Clark, and William Curtis were given choice work assignments that he should have received. See Employee's complaint at 3; see also Employer's exhibit A at 239-45. Every work assignment referred to by Employee was assigned in or before 1996, which precedes the filing of his EEOC complaint by more than 300days. Accordingly, Employee's claim that he received less favorable assignments than his co-workers will be dismissed as untimely. See Aronson, 961 F.2d at 910.

(b) actionable conduct

Employee has not cited, and the Court has not located, any authority showing that the award of preferential work assignments constitutes an adverse employment action for which an employee may seek redress. Cf. Sanchez, 164 F.3d at 532 (stating that adverse employment action is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.") ("[A] mere inconvenience or an alteration of job responsibilities" is not an adverse employment action). Accordingly, Employer is entitled to summary judgment on Employee's preference claim.

(c) treatment

Even if the Court were to assume *arguendo* that an employee may seek redress against his employer for

failing to receive preferential work assignments, Employee must show that he was treated less favorably than similarly situated co-workers. See, e.g., Sprague v. Thorns Americas, Inc., 129 F.3d 1355, 1363 (10th Cir. 1997). Employee has failed to meet his burden of showing that he was as qualified as or better qualified than Mr. Humphreys, Mr. Lyons, Mr. Clark, and Mr. Curtis for the positions at issue, because he has failed to provide any evidence of their performance, training, education, or skills. Without such evidence to buttress his claim, Employee cannot establish a *prima facie* case that he was the victim of discriminatory conduct. As the Tenth Circuit has stated:

> . . . although [Mr. Amro] has identified others who allegedly are similarly situated engineers, he has not provided any evidence of their performance, training, education or skills. [Mr. Amro's] own opinion that his performance is excellent does not raise a fact question as to how his performance compares to others.

Amro v. Boeing Co., 232 F.3d 790, 798 (10th Cir. 2000) (internal quotation omitted); see Jones, 203 F.3d at 754 (10th Cir. 2000). Accordingly, Employer is entitled to summary judgment on Employee's preference claim.

5) discipline

Employer moves for summary judgment on Employee's discipline claim in which Employee alleges that he was disciplined without justification or cause. See Employer's opening brief at 18-19. In support of its motion, Employer claims there is no evidence in the record that Employee suffered an adverse employment action for violating a work rule nor is there any such evidence that he was disciplined more harshly than

other employees who allegedly committed infractions of the same magnitude. See Elmore v. Capstan, Inc., 58 F.3d 525, 529 (10th Cir. 1995) (stating that in order to establish a *prima facie* case of discriminatory discipline, a plaintiff must show *inter alia* that he was disciplined for violating a work-place rule and that other employees were subject to more lenient discipline for infractions classified as comparable in seriousness).

In response, Employee argues that he was disciplined because he was placed on numerous APIPs, he was demoted, he was subjected to conclusory negative performance evaluations, and he was fired from his work. See Employee's response brief at 13. Employee's allegations, even if true, do not constitute discriminatory disciplinary action. As noted by Employer, Employee fails to establish that the aggrieved actions resulted from his violating a work-place rule and that the aggrieved actions amounted to disproportionately harsh treatment, both of which are elements of a discipline claim under the Elmore case. See Employer's reply brief at 10; see also Employer's exhibit E at 41 (Mr. Hole stating that the APIP process did not constitute discipline in this case). Employee's discipline claim will therefore be dismissed.

2. Legitimate Business Reasons

Employee has failed to establish a *prima facie* case that Employer discriminated against him because of his age. However, assuming *arguendo* that he had done so, Employer may rebut Employee's *prima facie* case by articulating legitimate, nondiscriminatory reasons for its employment actions. See Munoz, 221 F.3d at 1165 (stating that if the plaintiff in an ADEA case establishes a *prima facie* case of age discrimination, the defendants "must then articulate a legitimate, nondiscriminatory reason for the adverse employment action suffered by the plaintiff.").

Employer claims, and the Court agrees, that it has articulated legitimate, nondiscriminatory reasons for each adverse employment action asserted by Employee. In regard to the demotion claim, Employer has shown with particularity that from February 1996 through the date of Employee's demotion in September 1997, Employee's work performance as an SMTS was deficient. Employer also has shown that during that same time period there was insufficient funding to cover Employee's full-time effort because the work he specialized in was no longer in sufficient demand. Based on those facts, Mr. Hole demanded that Employee correct his deficiencies and bring in sufficient work to sustain his position as an SMTS. Only after Employee failed to satisfy those demands for well over a year was he demoted from the SMTS position to the STNG position. Accordingly, Employer has justified its decision for demoting Employee.

In regard to the termination claim, Employer has shown with particularity that from September 1997 through the date of Employee's termination in March 1998, Employee's work performance as an STNG was deficient. Employer also has shown that after Mr. Hole determined that Employee could not function at the STNG level, he attempted to find another position for Employee with Employer at the TNG level. When he was unable to locate an available position at the TNG level, Mr. Hole recommended that Employee's employment be terminated. Employer has therefore justified its decision for firing Employee.

C. HOSTILE WORK ENVIRONMENT

Employer moves for summary judgment on Employee's hostile work environment claim in which Employee alleges that he was harassed because of his age. See Employer's opening brief at 21-22; see generally

Employee's response brief (failing altogether to address Employer's argument on this issue). In support of its motion, Employer argues that: (1) the Tenth Circuit has not recognized a cause of action for hostile work environment under the Act; and (2) the alleged discriminatory comments were stray remarks that did not alter the terms, conditions, or privileges of Employee's employment.

1. Cause of Action

The Tenth Circuit has not expressly recognized a cause of action for hostile work environment under the ADEA. See Holmes, 1999 U.S. App. LEXIS 16406, 1999 WL 285826 at *7. However, it has decided a case where the plaintiff raised the issue before the district court. See id., *citing* McKnight v. Kimberly Clark Corp., 149 F.3d 1125, 1129 (10th Cir. 1998) (deciding a hostile work environment claim under the ADEA, but not addressing the apparent lack of authority for raising such a theory). In light of the McKnight case, the Court will assume without deciding that Employee may assert a hostile work environment claim under the ADEA.

In order to prevail on a hostile environment claim, the plaintiff must show that the workplace was "permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the employment and create an abusive working environment." Penry v. Federal Home Loan Bank of Topeka, 155 F.3d 1257, 1261 (10th Cir. 1998). For purposes of evaluating whether the plaintiff's working environment was sufficiently hostile or abusive to warrant relief, the court examines: (1) the frequency of the discriminatory conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the plaintiff's work performance. See

Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1072 (10th Cir. 1998). The plaintiff must establish "that the environment was both objectively and subjectively hostile or abusive." Davis v. U.S. Postal Service, 142 F.3d 1334, 1341 (10th Cir. 1998).

2. Comments

The only purported discriminatory comment that allegedly was made after September 11, 1997–and, hence, the only comment properly before this Court–is Mr. Hole's statement to an unidentified person that: "A person who's not wanted ought to quit." Employer's exhibit A at 271. When Employee was asked how he knew Mr. Hole was referring to him, Employee stated in relevant part:

> A: I didn't want to turn around and look at anybody. I just wanted to ignore it and go on, you know, but he was right behind me. There was nobody between us.
>
> Q: But he didn't say that using your name in any way, correct?
>
> A: No, no.

Id. at 271.

Assuming *arguendo* that Mr. Hole made the alleged remark and that he was referring to Employee, there is no evidence in the record that the remark altered the conditions of Employee's employment. First, the remark stands alone as a stray remark. Second, it is not severe in comparison with other remarks that have been dismissed by the Tenth Circuit as stray remarks. See Lucas v. Miami County, 2001 U.S. App. LEXIS 8926, 9 Fed.Appx. 809, 813-14, 2001 WL 497372, *4 (10th Cir. 2001) (unpublished opinion) (dismissing remark that

supervisor referred to employee as "that crazy old man upstairs" as a stray remark of little probative value); Campbell v. Mart, 216 F.3d 1086, 2000 U.S. App. LEXIS 25030, 2000 WL 826259, *2 (10th Cir. 2000) (unpublished opinion) (dismissing remark that manager commented that "poor old black woman wants to learn" as a stray remark). Third, there is no evidence in the record indicating that the remark was anything more than an offensive utterance with no reference to age. And fourth, there is no evidence in the record indicating that the remark interfered with Employee's work performance by causing him to feel humiliated, stressed, upset, or shocked.

Based on the foregoing, the Court concludes that Employer is entitled to summary judgment on Employee's hostile work environment claim. See Davis, 142 F.3d at 1341-42 (ruling that plaintiff need not show that abusive work environment seriously affected her psychological well-being, but must show that she endured humiliation sufficient to alter the terms and conditions of the workplace). Employee's hostile work environment claim will therefore be dismissed.

D. STATE LAW CLAIM

Employee seeks redress from Employer for wrongful termination of employment under the common law of the State of New Mexico. See Employee's complaint at 6. The basis for Employee's wrongful termination claim parallels the basis for his ADEA claim. Having dismissed Employee's ADEA claim, the Court also will dismiss his wrongful termination claim.

IV.

CONCLUSION

For the reasons set forth above, the Court finds that the defendants are entitled to summary judgment on the

plaintiff's complaint. An Order in conjunction with this Opinion will issue.

DATED at Albuquerque this 28th day of January, 2002.

BRUCE D. BLACK

United States District Judge

Footnotes

n1 Employer moves for summary judgment on all of Employee's claims that precede July 8, 1997, rather than all of his claims that precede September 11, 1997. See Employer's opening brief at 7. The discrepancy between the two dates stems from the fact that Employer misstates that Employee filed his EEOC complaint on May 4, 1998, when in fact he did not file his EEOC complaint until July 8, 1998. Thus, in order to properly determine the cut-off date applicable to Employee's claims in this case, the Court must subtract 300 days from July 8, 1998, which translates to September 11, 1997. See Bennett v. Quark, Inc., 258 F.3d 1220, 1225 (10th Cir. 2001) (recognizing that the cut-off date for the Act's limitations period is determined by subtracting 300 days from the date upon which the plaintiff filed a discrimination charge with the EEOC); Deflon v. Danka Corp. Inc., 2001 U.S. App. LEXIS 123, 2001 WL 13260, *4 (10th Cir. 2001) (same).

n2 The Court notes that Employee has not asserted a pattern-or-practice claim modeled on International Brotherhood of Teamsters v. United States, 431 U.S. 324, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977). Therefore, the Court limits its analysis in this Opinion to Employee's individual claim of age discrimination. Cf. Thiessen v. General Electric Capital Corp., 267 F.3d 1095, 1105 (10th Cir. 2001).

n3 Employee argues that Employer cannot rely upon his employment records to support its summary judgment motion because the records are inadmissible hearsay evidence. See, e.g., Employee's response brief at 6. Employee's argument is rejected on the ground that Mr. Hole prepared the records and is competent to testify about the matters asserted in those records. See Wright-Simmons, 155 F.3d at 1268 (ruling that at the summary judgment stage evidence need not be produced in a form that would be admissible at trial, so long as the content or substance of the evidence is admissible). Alternatively, Employee's argument is rejected on the ground that Mr. Hole executed an affidavit stating that he contemporaneously prepared the records for Employer, that the records are kept in the course of a regularly conducted business activity, and that it is the regular practice of Employer to make and keep such records. See Employer's reply brief, exhibit T. Accordingly, the records at issue fall under the business records exception to the hearsay rule and are therefore properly before this Court. See Fed.R.Evid. 803(6) (setting forth the business records exception to the hearsay rule); Wright v. Wyandotte County Sheriff's Dept., 963 F. Supp. 1029, 1035 (D.Kan. 1997).

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